

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

UNITED STATES OF AMERICA

*v.*

ALLEN J. PENDERGRASS

Criminal Action No.

1:17-CR-0224-AT

**Government's Requests to Charge**

The United States of America, by Kurt R. Erskine, United States Attorney, and Jeffrey Brown and Tracia King, Assistant United States Attorneys for the Northern District of Georgia, files these proposed jury instructions pursuant to Rule 30 of the Federal Rules of Criminal Procedure. The United States respectfully requests leave of the Court to allow the parties to propose additional pattern and/or special instructions as necessary at the close of the evidence.

Respectfully submitted,

KURT R. ERSKINE

*United States Attorney*

/s/Jeffrey Brown

JEFFREY BROWN

*Assistant United States Attorney*

Georgia Bar No. 088131

**GOVERNMENT'S REQUEST TO CHARGE NO. 1**

**COURT'S INSTRUCTIONS TO THE JURY<sup>1</sup>**

Members of the Jury:

It's my duty to instruct you on the rules of law that you must use in deciding this case. After I've completed these instructions, you will go to the jury room and begin your discussions – what we call your deliberations.

You must decide whether the Government has proved the specific facts necessary to find the Defendant guilty beyond a reasonable doubt.

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<sup>1</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 1 (2020).

## **GOVERNMENT'S REQUEST TO CHARGE NO. 2**

### **THE DUTY TO FOLLOW INSTRUCTIONS AND THE PRESUMPTION OF INNOCENCE<sup>2</sup>**

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against the Defendants or the Government.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the Court's instructions on the law.

The indictment or formal charge against a defendant is not evidence of guilt. The law presumes every defendant is innocent. The Defendants do not have to prove his or her innocence or produce any evidence at all. The Government must prove guilt beyond a reasonable doubt. If it fails to do so, you must find the Defendants not guilty.

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<sup>2</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 2.1 (2020).

### GOVERNMENT'S REQUEST TO CHARGE NO. 3

#### DEFINITION OF "REASONABLE DOUBT"<sup>3</sup>

The Government's burden of proof is heavy, but it doesn't have to prove a Defendant's guilt beyond all possible doubt. The Government's proof only has to exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based on your reason and common sense after you've carefully and impartially considered all the evidence in the case.

"Proof beyond a reasonable doubt" is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

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<sup>3</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 3 (2020).

## **GOVERNMENT'S REQUEST TO CHARGE NO. 4**

### **CONSIDERATION OF DIRECT AND CIRCUMSTANTIAL EVIDENCE; ARGUMENT OF COUNSEL; COMMENTS BY THE COURT<sup>4</sup>**

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and is not binding on you.

You should not assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You should not be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

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<sup>4</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 4 (2020).

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There is no legal difference in the weight you may give to either direct or circumstantial evidence.

## GOVERNMENT'S REQUEST TO CHARGE NO. 5

### CREDIBILITY OF WITNESSES<sup>5</sup>

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

- Did the witness impress you as one who was telling the truth?
- Did the witness have any particular reason not to tell the truth?
- Did the witness have a personal interest in the outcome of the case?
- Did the witness seem to have a good memory?
- Did the witness have the opportunity and ability to accurately observe the things he or she testified about?

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<sup>5</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 5 (2020).

- Did the witness appear to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from other testimony or other evidence?



## GOVERNMENT'S REQUEST TO CHARGE NO. 6

### IDENTIFICATION TESTIMONY<sup>6</sup>

The Government must prove beyond a reasonable doubt that the Defendant was the person who committed the crime.

If a witness identifies a Defendant as the person who committed the crime, you must decide whether the witness is telling the truth. But even if you believe the witness is telling the truth, you must still decide how accurate the identification is.

I suggest that you ask yourself questions:

1. Did the witness have an adequate opportunity to observe the person at the time the crime was committed?
2. How much time did the witness have to observe the person?
3. How close was the witness?
4. Did anything affect the witness's ability to see?
5. Did the witness know or see the person at an earlier time?

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<sup>6</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Special Instruction No. 3 (2020).

You may also consider the circumstances of the identification of the Defendant, such as the way the Defendant was presented to the witness for identification and the length of time between the crime and the identification of the Defendant.

After examining all the evidence, if you have a reasonable doubt that the Defendant was the person who committed the crime, you must find the Defendant not guilty.

## **GOVERNMENT'S REQUEST TO CHARGE NO. 7**

### **IMPEACHMENT OF WITNESSES BECAUSE OF INCONSISTENT STATEMENTS OR FELONY CONVICTION<sup>7</sup>**

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or did not say or do something, that was different from the testimony the witness gave during this trial.

To decide whether you believe a witness, you may consider the fact that the witness has been convicted of a felony or a crime involving dishonesty or a false statement.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

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<sup>7</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 6.2 (2020).

**GOVERNMENT’S REQUEST TO CHARGE NO. 8**

**TESTIMONY OF ACCOMPLICE OR CODEFENDANT WITH PLEA  
AGREEMENT<sup>8</sup>**

You must consider some witnesses’ testimony with more caution than others.

In this case, the Government has made a plea agreement with a Codefendant in exchange for [his] [her] testimony. Such “plea bargaining,” as it’s called, provides for the possibility of a lesser sentence than the Codefendant would normally face. Plea bargaining is lawful and proper, and the rules of this court expressly provide for it.

But a witness who hopes to gain more favorable treatment may have a reason to make a false statement in order to strike a good bargain with the Government.

So while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

And the fact that a witness has pleaded guilty to an offense isn’t evidence of the guilt of any other person.

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<sup>8</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Special Instruction No. 1.2 (2020).

And the fact that a witness has pleaded guilty to an offense isn't evidence of the guilt of any other person.

## **GOVERNMENT’S REQUEST TO CHARGE NO. 9**

### **CONJUNCTIVELY CHARGED COUNTS<sup>9</sup>**

Where a statute specifies multiple alternative ways in which an offense may be committed, the indictment may allege the multiple ways in the conjunctive, that is, by using the word “and.” If only one of the alternatives is proved beyond a reasonable doubt, that is sufficient for conviction, so long as you agree unanimously as to that alternative.

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<sup>9</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 8.1 (2020).

## GOVERNMENT'S REQUEST TO CHARGE NO. 10

### MAIL FRAUD<sup>10</sup>

It's a Federal crime to use the United States mail in carrying out a scheme to defraud someone.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly devised or participated in a scheme to defraud someone by using false or fraudulent pretenses, representations, or promises;
- (2) the false or fraudulent pretenses, representations, or promises were about a material fact;
- (3) the Defendant intended to defraud someone; and
- (4) the Defendant used the United States Postal Service by mailing or by causing to be mailed something meant to help carry out the scheme to defraud.

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<sup>10</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Offense Instruction No. 50.1 (2020).

A “scheme to defraud” means any plan or course of action intended to deceive or cheat someone out of money or property using false or fraudulent pretenses, representations, or promises.

A statement or representation is “false” or “fraudulent” if it is about a material fact, it is made with intent to defraud, and the speaker either knows it is untrue or makes it with reckless indifference to the truth. It may be false or fraudulent if it is made with the intent to defraud and is a half-truth or effectively conceals a material fact.

A “material fact” is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is “material” if it has the capacity or natural tendency to influence a person’s decision. It doesn’t matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with “intent to defraud” means to act knowingly and with the specific intent use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.



The Government does not have to prove all the details about the precise nature and purpose of the scheme or that the material mailed was itself false or fraudulent. It also does not have to prove that the use of the mail was intended as the specific or exclusive means carrying out the fraud, or that the Defendant did the actual mailing. It doesn't even have to prove that anyone was actually defrauded.

To "cause" the mail to be used is to do an act knowing that the use of the mail will usually follow in the ordinary course of business or where that use can reasonably be foreseen.

Each separate use of the mail as part of the scheme to defraud is a separate crime.

## GOVERNMENT'S REQUEST TO CHARGE NO. 11

### MONEY LAUNDERING CONSPIRACY<sup>11</sup>

It's a Federal crime to conspire to engage in money laundering or transactions involving the proceeds of specified unlawful activity that violates Title 18, United States Code, Section 1956.

Title 18, United States Code, Section 1956 makes it a Federal crime to knowingly engage in certain kinds of financial transactions commonly known as money laundering. The elements of this offense are:

- (1) the Defendant knowingly conducted or tried to conduct, a financial transaction;
- (2) the Defendant knew that the money or property involved in the transaction were the proceeds of some kind of unlawful activity;
- (3) the money or property did come from an unlawful activity, specifically Mail Fraud, as alleged in Counts 1 through Five of the Indictment; and
- (4) the Defendant was involved in the financial transaction with the intent to promote the carrying on of that specified unlawful activity.

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<sup>11</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Offense Instruction No. 74.5 (2020).

A “conspiracy” is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member.

The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) two or more people agreed to try to accomplish a common and unlawful plan to violate 18 U.S.C. Section 1956; and
- (2) the Defendant knew about the plan’s unlawful purpose and voluntarily joined in it.

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and voluntarily joined in the plan on at least one occasion – that’s sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also a person who doesn’t know about a conspiracy but happens to act in a way that advances some purpose of one doesn’t automatically become a conspirator.

## GOVERNMENT'S REQUEST TO CHARGE NO. 12

### AGGRAVATED IDENTITY THEFT<sup>12</sup>

It's a Federal crime to commit aggravated identity theft.

The Defendant can be found guilty of aggravated identity theft only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly transferred, possessed, or used another person's means of identification;
- (2) without lawful authority; and
- (3) during and in relation to Mail Fraud as alleged in the indictment.

A "means of identification" is any name or number used, alone or together with any other information, to identify a specific person, including a name, social security number, date of birth, officially issued driver's license or identification number, alien registration number, passport number, employer or taxpayer identification number, or electronic identification number or routing code. It can also include a fingerprint, voice print or other biometric data.

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<sup>12</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Offense Instruction No. 74.5 (2020).

The Government must prove that the Defendant knew that the means of identification, in fact, belonged to another actual person, living or dead, and not a fictitious person.

The Government must prove that the Defendant knowingly transferred, possessed, or used another person's identity "without lawful authority." The Government does not have to prove that the Defendant stole the means of identification. The Government is required to prove the Defendant transferred, possessed, or used the other person's means of identification for an unlawful or illegitimate purpose.

The Government also must prove that the means of identification was possessed "during and in relation to" the crime alleged in the indictment. The phrase "during and in relation to" means that there must be a firm connection between the Defendant, the means of identification, and the crime alleged in the indictment. The means of identification must have helped with some important function or purpose of the crime, and not simply have been there accidentally or coincidentally. The means of identification at least must facilitate, or have the potential of facilitating, the crime alleged in the indictment.

## GOVERNMENT’S REQUEST TO CHARGE NO. 13

### AIDING AND ABETTING; AGENCY<sup>13</sup>

It’s possible to prove the Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or “agent.” Or it may be done by acting with or under the direction of others.

A Defendant “aids and abets” a person if the Defendant intentionally joins with the person to commit a crime.

A Defendant is criminally responsible for the acts of another person if the Defendant aids and abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it.

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<sup>13</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Special Instruction No. 7 (2020).

In other words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.



## **GOVERNMENT'S REQUEST TO CHARGE NO. 14**

### **ON OR ABOUT; KNOWINGLY; WILLFULLY – GENERALLY<sup>14</sup>**

You'll see that the indictment charges that a crime was committed "on or about" a certain date. The Government doesn't have to prove that the crime occurred on an exact date. The Government only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

The word "willfully" means that the act was committed voluntarily and purposefully, with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids before you can find that the person acted "willfully," the person need not be aware of the specific law or rule that his conduct may be violating.

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<sup>14</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 9.1A (2020).

**GOVERNMENT’S REQUEST TO CHARGE NO. 15**

**CAUTION: PUNISHMENT  
(SINGLE DEFENDANT, MULTIPLE COUNTS)<sup>15</sup>**

Each count of the indictment charges a separate crime. You must consider each crime and the evidence relating to it separately. If you find the Defendant guilty or not guilty of one crime, that must not affect your verdict for any other crime.

I caution you that the Defendant is on trial only for the specific crimes charged in the indictment. You’re here to determine from the evidence in this case whether the Defendant is guilty or not guilty of those specific crimes.

You must never consider punishment in any way to decide whether the Defendant is guilty. If you find the Defendant guilty, the punishment is for the Judge alone to decide later.

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<sup>15</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 10.2 (2020).

## GOVERNMENT'S REQUEST TO CHARGE NO. 16

### SIMILAR ACTS EVIDENCE<sup>16</sup>

During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant is currently charged. You must not consider any of this evidence to decide whether the Defendant engaged in the activity alleged in the indictment. This evidence is admitted and may be considered by you for the limited purpose of assisting you in determining whether [the Defendant had the state of mind or intent necessary to commit the crime charged in the indictment] [the Defendant had a motive or the opportunity to commit the acts charged in the indictment] [the Defendant acted according to a plan or in preparation to commit a crime] [the Defendant committed the acts charged in the indictment by accident or mistake].

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<sup>16</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Special Instruction No. 4.1 (2020).

## GOVERNMENT'S REQUEST TO CHARGE NO. 17

### DUTY TO DELIBERATE<sup>17</sup>

Your verdict, whether guilty or not guilty, must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you're judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

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<sup>17</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 11 (2020).

**GOVERNMENT’S REQUEST TO CHARGE NO. 18**

**VERDICT<sup>18</sup>**

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and will speak for you in court.

A verdict form has been prepared for your convenience.

[Explain verdict]

Take the verdict form with you to the jury room. When you’ve all agreed on the verdict, your foreperson must fill in the form, sign it, date it, and carry it. Then you’ll return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the marshal. The marshal will bring it to me and I’ll respond as promptly as possible – either in writing or by talking to you in the courtroom. But I caution you not to tell me how many jurors have voted one way or the other at that time.

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<sup>18</sup> Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Basic Instruction No. 12 (2020).

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the attorney(s) of record.

This 28th day of November, 2021.

/s/Jeffrey Brown  
ASSISTANT U.S. ATTORNEY